86 1737

IN THE SUPREME COURT OB THE
UNITED STATES

OCTOBER TERM, 1986

NO._____

DAN L. FLAUGH, PETITIONER

VS.

STATE OF MICHIGAN, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

TAT PARISH (P18636)
COUNSEL FOR PETITIONER
MICHAEL DORSTEWITZ (P32367)
OF COUNSEL
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QUESTIONS PRESENTED

Whether the Petitioner was denied effective assistance of counsel, where defense counsel:

1. Failed to use letters available to him to impeach the credibility of the key prosecution witness;

2. Failed to allude to the doctrine of reasonable doubt during closing argument;

3. Failed to object to the Prosecutor's characterization of a witness's testimony as a dying declaration; and,

4. Failed to object to other items of prosecution testimony.

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EDITOR'S NOTE:

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OCTOBER TERM, 1986

NO._____

DAN L. FLAUGH, PETITIONER

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oooOooo

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF
MICHIGAN

TO: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

Dan L. Flaugh, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court for the State of Michigan entered in the above-entitled case

January 26,1987.

OPINIONS BELOW

The Order of The Michigan Supreme Court dated January 26, 1987, denying leave to appeal was unreported and is printed in Appendix A hereto,infra, page 31. The unreported per curiam opinion of The Michigan Court Of Appeals dated August 7, 1986 is printed in Appendix A hereto, infra page 34. The Journal Entry of Judgment of The Circuit Court for the County of Berrien is printed in Appendix A hereto, infra page 44.

JURISDICTION

The judgment of the Court for the County of Berrien (Appendix A, infra page 44) was entered on December

19,1984. The Court of Appeals for the State of Michigan entered its opinion on August 7, 1986 affirming Petitioner's conviction. The Supreme Court for the State of Michigan entered its order denying leave to appeal on January 26, 1987. The jurisdiction of the Supreme Court is invoked under 28 USC Section 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment (as applied through the Fourteenth Amendment) to the

Constitution of the United States, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature of the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF CASE

The Defendant, Dan L. Flaugh was convicted following a jury trial of two felonies: arson of a dwelling and conspiracy to commit arson of a dwelling.

A Benton Harbor,Michigan dwelling burned on December 24,1982.

Captain Ron Baskin, who was present at the fire, testified that part of his

duties included investigating the cause or origin of the fire, and nothing led him to believe that the fire was of a gas origin. He "never" did determine what the cause was.

Sixteen months later (on April 19,1984) Alan Hughes of the State Police Fire Marshall Division performed an investigation on the premises to determine whether or not there had been an arson. Mr. Hughes determined that there were three fires at the house. In his opinion the majority of the fire damage was at the area of a natural gas line where he found a loosened coupler.

The owner of the house testified that he had insured the house through Flaugh Insurance Agency since 1974.

After the fire, a Richard Satonin approached the owner about bidding on

repair work at the house.

The owner testified that he had never had any conversations with the Defendant, Mr. Flaugh, Richard Satonin or Frank Genovese about burning his house or any other house.

Mr. Satonin testified at Mr. Flaugh's trial pursuant to a plea agreement. In return for his testimony concerning the fire and the alleged conspiracy to commit arson, no charges were to be brought against Mr. Satonin for those offenses. The prosecutor also made other promises to Mr. Satonin concerning preferential placement in preferred correctional facilities and promised not to seek an enhancement of his sentence on two other charges of arson.

Satonin testified that he had approached Dan Flaugh at the end of

October or early November, 1982 and had asked him to send some insurance repair work his way. Allegedly, Mr. Flaugh told him he had a better deal. Satonin stated that Mr. Flaugh asked if he would like to make $100,000 per year.

Satonin testified that he met Mr. Flaugh the next morning and that Mr. Flaugh asked him to go to South Haven, Michigan. Satonin testified that they drove separate cars to Bernie's Auto Parts in South Haven. Satonin further stated that Mr. Flaugh and he drove back to Benton Harbor in a yellow Karmann Ghia which they borrowed because Mr. Flaugh's Volkswagen had broken down.

Bernie Moret, the owner of Bernie's Auto Parts, testified however, that no one was with Dan Flaugh the day he came to South Haven. Moret further testified

that he did not own the yellow Karmann Ghia that he loaned Mr. Flaugh until December 6th or 7th, 1982. Satonin had testified that it was late October or early November, 1982 when he claimed to have driven back from South Haven in the Karmann Ghia with Mr. Flaugh.

Satonin stated that about December 10,1982 he met with Mr. Flaugh and indicated to him he was going to burn the house down by igniting the gas furnace. Satonin, however, testified later that he did not know how to burn a house by using a gas furnace so he inquired of Frank Genovese as to how to do it. According to Satonin, Mr. Genovese offered to help burn the house down.

Satonin's trial testimony was that he received only one key to the house from Mr. Flaugh. This conflicts with

his previous testimony at the Preliminary Examination. At the Preliminary Examination, Satonin testified that he had received two keys from Mr. Flaugh, one for the door and one for the alarm system.

Genovese's testimony also conflicted with Satonin's trial testimony. Genovese stated that Satonin was given two keys. (Genovese's Preliminary Examination testimony was read into the record at trial because he died unexpectedly prior to trial).

Dan Flaugh's only prior dealings with Satonin and Genovese were to employ Satonin on a couple of occasions to do repair work and to help Genovese settle a claim involving a fight at the American Legion Hall.

In connection with that settlement, Genovese made threatening statements to

Mr. Flaugh that he had "screwed" him out of a lot of money and threatened to get even with Mr. Flaugh.

Letters were written by Satonin which Mr. Flaugh's counsel failed to introduce at trial despite his acknowledgement that the letters contained statements which would exculpate Mr. Flaugh. In those letters Satonin stated that Genovese lied concerning money he said Dan Flaugh paid him and that Genovese was intentionally lying to get back at Dan Flaugh for the insurance settlement he had threatened him about. Mr. Flaugh's counsel was aware that the statements by Satonin in these two letters indicated that Mr. Flaugh was not guilty of anything. Yet he failed to introduce them. Mr. Flaugh's counsel failed to introduce these exculpatory

letters despite their potential for impeaching Genovese's and Satonin's testimony and despite Mr. Flaugh's Counsel's testimony that it "all boiled down to whether the jury was going to believe Mr. Flaugh or Mr. Satonin. That was really the nuts and bolts of the case."

Prior to his closing argument defense counsel walked out of the Courtroom without excusing himself and without permission of the Court. He was followed by the Defendant who did not know any better. This resulted in the Court chastising both the defense counsel and the Defendant in the presence of the jury. Mr. Flaugh`s defense counsel also failed to object during the prosecutor's closing argument when the prosecutor referred to Mr. Genovese's testimony and stated

"a dying man, you know has no reason to get up there and lie." There was no evidence that Mr. Genovese was dying at the time he gave his preliminary examination testimony. Mr. Flaugh's counsel also failed to object when the prosecutor stated in his closing argument that it was his personal opinion that the Defendant was guilty.

On cross-examination Satonin volunteered a claim that the Defendant was implicated in other arsons. Again, Defense counsel failed to object, failed to move for a mistrial and also failed to ask the Court to strike the testimony.

Later in the trial, Mr. Flaugh's counsel failed to even once allude to, explain or emphasize the doctrine of reasonable doubt in his closing argument.

Mr. Flaugh took the witness stand at his trial. He stated, contrary to Satonin's testimony (yet consistent with Moret's testimony), that he was alone on the day he went to South Haven and ended up borrowing the yellow Karmann Ghia. Mr. Flaugh further testified that he never gave Satonin keys to the Duke house and he never entered into an agreement with Satonin or anyone to burn the house.

Following conviction and sentencing, Petitioner moved for a new trial, claiming a denial of his Sixth Amendment right to effective assistance of counsel. His motion was denied following an evidentiary hearing.

Petitioner then filed a timely claim of appeal to the Michigan Court of Appeals. His conviction was affirmed in an unpublished per curium opinion on

August 7,1986. Application for leave to appeal to the Michigan Supreme Court was denied on January 26,1987. The issue of effective assistance of counsel under the Sixth Amendment was raised in both appellate courts.

Petitioner now petitions this Honorable Court for a Writ of Certiorari.

REASONS FOR GRANTING WRIT

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right *** to have the assistance of counsel for his defense."

This guarantee to the assistance of counsel has been interpreted to mean the effective assistance of counsel. Powell vs. Alabama, 287 US 45, 71; 53 S. Ct. 55; 77 L. Ed. 158 (1932).

In Beasley vs. United States, 491 F. 2d 687, 696 (1974), the United States Court of Appeals for the Sixth Circuit adopted the following test to determine ineffectiveness:

> " that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence."

This Court recently addressed a claim of "actual ineffectiveness" of counsel in a case going to trial. Strickland vs. Washington, 466 US 668; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984). This Court held:

> " First, the Defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the

> Defendant must show that the deficient performance prejudiced the defense. This requires showing the counsel's errors were so serious as to deprive the Defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id.

This Court declined to set specific guidelines for determining claims of ineffectiveness of counsel, but instead stated that " the defendant must show the counsel's representation fell below an objective standard of reasonableness." 104 S. Ct. at 2066.

With respect to the second prong of the test, this Court held:

> " The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence

in the outcome." 104 S.Ct. at 2068.

The Defendant does not have to show "that counsel's deficient conduct more likely than not altered the outcome of the case." Id. Rather:

> "The result of a proceeding can be rendered unreliable, and hence, the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Id.
>
> * * *
>
> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 104 S.Ct. at 2069.

A Court hearing an ineffectiveness claim must consider the totality of the evidence. A "verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record

support." Id.

Looking at the "totality of the evidence," Mr. Flaugh was denied the effective assistance of counsel in several instances which, combined, amount to harmful error.

First of all, Defense Counsel failed to introduce two letters written by Satonin. These letters could have been used to impeach Mr. Satonin, whose testimony was highly damaging to Mr. Flaugh. The Defense Counsel acknowledged that these two letters tended to exculpate Mr. Flaugh. These letters would have destroyed or substantially impaired the credibility of Mr. Satonin. This was a key failure of Defense Counsel. It is important to note that this case turned upon whether the jury believed Mr. Satonin,(and, to a lesser extent, Frank Genovese, who

died before the trial, and whose testimony from the preliminary examination was read into the record). Defense counsel acknowledged this at the evidentiary hearing on the issue of ineffective assistance when he testified that it "all boiled down to whether the jury was going to believe Mr. Flaugh or Mr. Satonin. That was really the nuts and bolts of the case." Failure to make use of this impeaching and exculpatory evidence resulted in Mr. Flaugh being denied the effective assistance of counsel.

Secondly, defense counsel failed to even once allude to, explain or emphasize the doctrine of reasonable doubt in his closing argument to the jury. That doctrine, along with the presumption of innocence, has been called "The Golden Thread" of the

English Common Law, upon which our system of justice is based. Defense counsel's reply to this allegation of ineffective assistance was a muted: "They don't need to hear it from me. They hear it from the Judge."

In their treatise of criminal advocacy, F.L. Bailey and Henry Rothblatt urged that "Summation is the finishing touch, your final opportunity to convince the jury of your client's innocence." Fundamentals of Criminal Advocacy, Bailey and Rothblatt, Section 444, p. 376. The authors state that the defense lawyer should discuss reasonable doubt in his summation:

> Be sure that each member of the jury knows the vital difference between the rule of preponderance of the evidence in a civil case and reasonable doubt in a criminal case. Emphasize this, whether or not the jurors have had previous criminal case experience. Take nothing for granted.

Id. Section 477, p 404.

The authors go on to state that the defense lawyer should stress lack of proof of guilt beyond the reasonable doubt in his summation.

> Your entire summation is based on one premise: The failure of the prosecutor to establish guilt of the defendant beyond reasonable doubt. Your argument has been pointed toward using the doubt in the minds of the jurors. Therefore, your summation must finish on that note.

Id. Section 531, p 412.

Defense Counsel's failure to even discuss (much less stress) reasonable doubt in summation is a failure to perform "at least as well as a lawyer with ordinary training and skill in the criminal law" and a failure to "conscientiously protect his client's interests."

The third instance of ineffective assistance occurred toward the end of

the trial. Defense counsel walked out of the courtroom without excusing himself and without permission of the Court. He was followed by the hapless Defendant who did not know any better. As a result, the trial court Judge chastised both the defense counsel and the Defendant in the presence of the jury. During this public chastising, defense counsel failed to request the Court to excuse the jury. Instead, this "tongue-lashing" took place in the presence of the jury without any objection or attempt to mitigate the damage. It is at least foreseeable that the Defendant was prejudiced in the eyes of the jury as a result of his counsel's action and omissions. See Young vs. The United States, 346 F. 2d. 793 (D.C. Cir.,1965).

The fourth instance of ineffective

assistance was the failure to object to the prosecutor's closing statements that were based on evidence not presented at trial. People vs McCain, 84 Mich. App. 210, 215;241 N.W.873 (1970). The prosecutor stated "a dying man, you know, he has no reason to get up there and lie." This statement was made in reference to Mr. Genovese's testimony which was read into the record at the trial because he died unexpectedly in jail and prior to trial. Genovese did not know he was dying at the time he gave his preliminary examination testimony. It is at least foreseeable that the prosecutor's misleading statement caused the jury to give more weight to Genovese's testimony than was due.

The fifth example of ineffective assistance is based on the failure to

object when the prosecutor stated to the jury in his closing argument that it was his personal opinion that the Defendant was guilty. Under Michigan Law, prosecutors are not allowed to express their personal feelings as to the guilt of a defendant. People vs. Hill, 258 Mich. 79,241 N.W. 873 (1932).

Defense counsel also failed to even object (much less move to strike or move for a mistrial) when Satonin volunteered non-responsive allegations on cross-examination that the Defendant was implicated in other arsons. Satonin stated that "Danny Flaugh gave me more than one set of keys for more than one house to burn, so I had quite a few keys at the time." Because of defense counsel's omissions here, it is highly likely that the jury considered this inappropriate "bad acts" evidence

to conclude that the Defendant was guilty of the arson charged in this case.

Another example of ineffective assistance was defense counsel's failure to object to the prosecution's cross-examination of the Defendant. This involed a supposed conflict of interest between the Defendant and the American Legion post of which he was a member while the Defendant was attempting to "settle" an insurance claim that Frank Genovese had against The American Legion post. As defense counsel stood mute, the jury heard this obviously prejudicial and improper testimony to the point where the trial Judge, himself, sua sponte ruled the testimony inadmissable. After the Judge raised the issue, defense counsel finally objected but failed to

request a cautionary instruction and failed to request that the testimony be stricken from the record. Again, defense counsel allowed damaging, inadmissable evidence to be heard by the jury, which would tend to influence them to believe that Mr. Flaugh was a "bad man."

Defense counsel's response to these allegations was "there is no sense in ringing a bell twice in light of the fact that you can't unring it once it's rung." By following this philosophy, defense counsel in all of the above-cited omissions and other examples of ineffective assistance, was not performing "at least as well as a lawyer with ordinary training and skill in criminal law." A lawyer with ordinary training and skill would make proper evidentiary objections to keep

damaging, inadmissable evidence from the jury. He would have also moved to strike.

Defense counsel's assistance was also ineffective in that he failed to inquire of his own client when he was on the stand as to the circumstances under which he was to receive repayment of the money he had loaned to Mr. Genovese. Defense counsel failed to ask Mr. Flaugh to explain that he had loaned approximately $300 to Mr. Genovese as an advance on an insurance settlement. This failure left the jury with the impression that the Defendant had "loaned" a substantial sum of money to a virtual stranger with no reasonable expectation of being repaid. Without an explanation being elicited by defense counsel, a reasonable inference for the jurors was that this

payment was in consideration for Mr. Genovese starting a fire in Mr. Duke's house.

In the instant case, the evidence against the Defendant was less than overwhelming. It essentially boiled down to Mr. Flaugh's word against Mr. Satonin's word. There were several instances of conflicting testimony by Satonin and Genovese. The emphasis of these contradictions to the jury was crucial because it undermined the credibility of the prosecution's witnesses. Despite this, defense counsel did not emphasize the conflicts, contradictions and discrepancies during closing argument in this essentially "word-against-word" case.

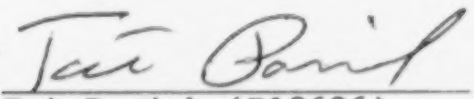
The failure to make these arguments concerning the credibility of Satonin

and Genovese (the State's chief witnesses) cannot be dismissed as mere trial strategy. A lawyer with ordinary skill and training in criminal law would have hammered home the lack of credibility of these witnesses and would have argued that this lack of credibility raised a reasonable doubt. The failure to do so constitutes ineffective assistance of counsel which prejudiced Mr. Flaugh's defense.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully sumitted,



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APPENDIX A

ORDER OF SUPREME
COURT, STATE OF
MICHIGAN, DATED
JANUARY 26, 1987

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 26th day of January in the year of our Lord one thousand nine hundred and eighty-seven.

79507 Present the Honorable

Dorothy Comstock Riley,

Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DENNIS W. ARCHER,
ROBERT P. GRIFFIN,
Associate Justices

PEOPLE OF THE STATE
OF MICHIGAN,
Plaintiff-Appellee,
v.
DAN L. FLAUGH, SC:79507
COA:85417
LC:84-1370-FH
Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

0120

STATE OF MICHIGAN-ss.

I,CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF,I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 26th day of January in the year of our Lord one thousand nine hundred and eighty-seven.

_____Clerk
Jacqueline B. MacKinnon
Deputy

OPINION OF MICHIGAN
COURT OF APPEALS
DATED AUGUST 7, 1986

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellee,

V. No.85417
DAN L. FLAUGH,
Defendant-Appellant.

BEFORE: J.B. Sullivan, P.J., R.M. Maher and M.G. Harrison*, JJ. PER CURIAM

Following a jury trial, defendant was convicted of arson of a dwelling house, MCL 750.72; MSA 28.267, and of conspiracy to commit arson, MCL 750.151; MSA 28.348. He was sentenced to identical concurrent prison terms of 4 to 20 years. Defendant now appeals the convictions and sentences as of right. We affirm.

The convictions arose from a fire set at a single family dwelling in Benton Harbor. The house was owned by

Leandrew Dukes and insured through the Flaugh Insurance Agency, specifically through defendant. According to the evidence presented at trial, defendant agreed to pay Richard Satonin between $2,500 and $3,500 to burn down the Dukes home and Satonin agreed to pay Frank Genovese, a gas furnace expert, one half of such proceeds for his assistance. The fire was set on December 24, 1982, by Satonin and Genovese, pursuant to orders by defendant. Taking the stand in his own defense, defendant denied any involvement in the fire.

Defendant initially claims that he was denied the effective assistance of trial counsel. In support, defendant delineates ten alleged errors committed

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*Circuit Judge, sitting on Court of Appeals by assignment.

by counsel during the course of trial. We have fully reviewed these claims and find that they either concern matters of permissable trial strategy, for which this Court will not substitute its judgement, People v. Harris, 133 Mich App 646,654;350 NW2d 305 (1984) or are grounds which do not support a claim of ineffective assistance. Our review of the record reveals that the performance of trial counsel met the standards enunciated in People v Garcia, 398 Mich 250;247 NW2d 547 (1976) and Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), reh den 104 S Ct 3562 (1984).

Defendant next contends that he was denied a fair trial when the trial court admonished him and his trial counsel for walking out of the

courtroom, presumably to get a witness, during the trial. Defendant reasons that because the court's remarks prejudiced him in the eyes of the jury, he is entitled to a new trial. We disagree.

MCL 768.29; MSA 28.1052 imposes upon the judge the duty to control all proceedings during trial. However, this power is not unlimited. If an examination of the record reveals that the conduct of the trial court pierced the veil of judicial impartiality and prevented defendant from having a fair and impartial trial, defendant's conviction must be reversed. People vs. Roby, 38 Mich App 387, 389-90; 196 NW2d 346 (1972). A new trial is required where the judge "displayed partiality that quite possibly could have influenced the jury to the detriment of

defendant's case." Id at 392. See also People v Jackson, 98 Mich App 735,740;296 NW2d 348 (1980), lv den 409 Mich 930 (1980).

The judge's remarks in the instant case do not reflect partiality. They were made solely for the purpose of controlling the conduct of the attorneys and parties in the courtroom. They casted no doubt on the credibility of the defendant or any of his witnesses, and in no way did they relate to the merits of the case. The statements cannot be said to have unduly influenced the jury.

In any event, the judge instructed the jury that neither his comments nor instructions were evidence and that they should not be taken as an indication of his opinion as to how the jury should determine the facts. This

sufficiently cured any prejudice that might have otherwise resulted.

We also reject defendant's allegation that he was denied a fair trial as a result of the prosecutor's statement at the end of his closing argument that defendant was guilty of the charged offenses. Defendant claims on appeal that the remark was an improper expression of the prosecutor's opinion and is therefore reversible error.

Since defendant failed to object to the remark, review is limited to whether failure to consider the issue would result in a miscarriage of justice. People v Matthews, 143 Mich App 45, 59; 371 NW2d 887 (1985). Although it is improper for the prosecutor to personally affirm the accused's guilt, he is free to relate

the facts to his theory of the case and to argue to the jury the evidence and all reasonable inferences that may be derived therefrom. In re Wardell Jones, 142 Mich App 207, 214; 369 NW2d 212 (1985), People v Earnest Smith, 87 Mich App 18, 28; 273 NW2d 573 (1978).

Here, in making the statement at issue, the prosecutor was not expressing his personal belief of defendant's guilt, but was commenting on the evidence that had been presented and on reasonable inferences drawn from such evidence. The remark came at the very end of his rebuttal argument and related to the evidence which he had reviewed at length. Consequently, the remark was proper and no manifest injustice would result if the issue was not reviewed.

Finally, we consider the sentence

imposed on defendant. Defendant was sentenced to two concurrent terms of 4 to 20 years imprisonment. The sentencing guidelines recommend a minimum range of from 18 to 30 months.

Defendant contends that his status as a community leader was an impermissible reason relied upon for departure from the guidelines. This argument is unpersuasive.

In making the statement to which defendant now objects, the trial judge was stressing the fact that arson was a serious crime, particularly when committed by a community leader who is trusted by the public. Such consideration was not error.

After a review of the record and the comments offered by the Court at sentencing, we are of the opinion that the reasons offered for departure was

appropriate and that the sentence does not shock our judicial conscience. People v Coles, 417 Mich 523; 339 NW2d 440 (1983). This Court has previously rejected defendant's argument that a sentencing judge cannot rely on factors already considered by the sentencing guidelines in departing from the guidelines. People v Ridley, 142 Mich App 129; 369 NW2d 449 (1984), People v Wyngaard, ____Mich App_____(no.83519, rel'd 4/21/86).

AFFIRMED.

/s/Joseph B. Sullivan
/s/ Richard M. Maher
/s/ Michael G. Harrison

DOCKET ENTRIES,
CIRCUIT COURT FOR
COUNTY OF BERRIEN,
STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN	PROS. ATTY 84-1370-FH (Pg. #)	
	Attorney for Defendant: Donald Bliech	Judge: Byrns
DAN L. FLAUGH I-Arson #-Consp Commit Arson	Ivan Barris 1930 Buhl Bldg. Detroit,MI 48226	

Date

12-4-84 Verdict Form (CT. I-ARSON:GUILTY)(CT. II-CONSPIRACY: GUILTY)

12-4-84 Order directing post conviction appearances; adm. memo dated 2-21-84 & sentencing guidelines dated 3-1-84

12-4-84 Order re: Time of filing arraignment transcript

12-17-84 "Notice of Hearing; Proof of Mailing; Substitution of Attys-Donald Bleich; Notice of Appearance of Atty Ivan Barris; Motion to Enlarge time to File Motion for New Trial & for Stay of Execution of Sentence-by Ivan E. Barris

12-19-84 (Byrns) Defendant and Attorney before the Court for sentence. SPSM 4-20 yrs, credit of 3 days. Rts. given. Motion for stay of execution of sentence heard and denied. Motion for extension for filing on motion of new trial granted. Motion for bond pending

appeal denied.

12-19-84 "Judgment of Sentence; copy of Record of Sentence on Verdict of Jury; Indeterminante Sentence Record.; Reporter's Certificate

---

CCF-14-76
12-18-84 "Answer to Deft's Motion to Enlarge time to file Motion for New trial and for Stay of Execution of Sentence

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12-26-84 Warrant for removal of Prisoner

12-26-84 Filed Sentencing Information Report

12-27-84 "Motion Trans.; Sentence Trans.; Proof of Service

12-27-84 "Order Granting Extension of Time in Which to file Motion for New Trial & Denying Motion for Stay of Execution of Sentence & Denying the Setting of Bond During the Course of Appellate Proceedings &/or While the Motion for New Trial has not been heard

---

1-2-85 "Notice of Hearing; Proof of Service; sentence papers; appeal papers.

12-29-84 "Proof of Service, Notice of Hearing; copy of appeal papers, etc.

2-6-85 Order from Court of Appeals that Motion for immediate consideration be granted further that application for leave to appeal is denied.

2-4-85 "Notice of filing& Affidavit of Reporter; Trial Trans. (vol.1-4)

3-18-85 "Proof of Mailing; Motion for New Trial; Notice of Hearing

4-3-85 "Renewed Motion to Admit to Bail; Notice of Hearing; Proof of Mailing

4-16-85 "Answer to Renewed Motion to Admit Bail; Proof of Service

5-3-85 "Order Requiring Briefs in Contested Motions

5-3-85 "Complaint for Writ of Habeas Corpus; Writ of Habeas Corpus

5-7-85 Return of officer (1) served

5-8-85 "Motion for More Definite Statement; Proof of Service; Notice of Hearing

5-10-85 "Proof of Mailing

5-16-85 "Affidavit of Dan L. Flaugh; Affidavit of Walt Allen; Affidavit of Robert Becker

5-17-85 "Order Granting Motion for More Definite Statement

5-20-85 "Answer to Motion for New Trial& Proof of Service

5-24-85 "Writ of Habeas Corpus;

Complaint for Same; Arrest Report

5-29-85 "Order Denying Motion for New Trial & Bond on Appeal

5-30-85 "Reporter's Certificate

#1416
CCF-14-76
6-6-85 "Notice of filing Claim of Appeal; Claim of Appeal; Reporter's Certificate; Proof of Mailing

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5-3-85 (Taylor) renewed motion for bond pending appeal; heard, argued and ruling reserved until hearing on motion for new trial.

5-24-85 (Taylor) The defendant and his attorney present in open court on motion for new trial. The Court heard the testimony of defendant, Robert Becker, Jon Nichols, Michael Renkowitz, and Donald Bleich. The Court heard arguments of counsel, gave its reasons on the record and denied the motion for new trial. Motion to reconsider appeal bond was heard and denied.

6-21-85 Notice of Filing & Affidavit of Reporter; Trial Transcript

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12-9-85 File & Trans. sent to Court of Appeals

8-8-86 Order from Court of Appeals affirming

9-8-86 File returned & trans from Court of Appeals with remittitur of record

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10-3-86 Notice of hearing & proof of service with application for leave to appeal

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10-8-86 Sent File & Transcripts to Supreme Court

CCF 14-76

86 1737

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

DAN L. FLAUGH, PETITIONER

VS

STATE OF MICHIGAN, RESPONDENT

WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT

PAUL L. MALONEY (P25194)
COUNSEL FOR RESPONDENT

BY: DAVID P. LAFORGE (P38028)
BUSINESS ADDRESS:
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ST. JOSEPH, MI 49085
(616) 983-7111 Ext. 311

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QUESTION PRESENTED

Should Petitioner's Writ of Certiorari be granted where Petitioner merely requests this Court to apply established law to a particular fact situation and where Petitioner has failed to demonstrate that the state courts have decided a federal question in a way that conflicts with decisions of other state courts, of a federal court of appeals or of this Court?

STATEMENT OF THE CASE

Petitioner was convicted by a jury of Arson of a Dwelling House and Conspiracy to Commit Arson on November 30, 1984. Petitioner subsequently filed a Motion for a New Trial raising numerous allegations of ineffective assistance. A lengthy evidentiary hearing was held on the motion at which Petitioner's retained trial attorney, among others, testified. Petitioner's trial attorney explained many of his actions and strategies he chose to utilize during the trial. The trial court denied Petitioner's Motion and Petitioner appealed to the Michigan Court of Appeals. That Court, in a unanimous unpublished per curiam opinion, affirmed Petitioner's conviction. The Court specifically found that the performance of Petitioner's trial counsel met the standards enunciated in Strickland v

Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), reh den 467 US 1267; 104 S Ct 3562; 82 L Ed 2d 864 (1984) and People v Garcia, 398 Mich 250; 247 NW2d 547 (1976). Petitioner next filed an application for leave to appeal in the Michigan Supreme Court which was denied without dissent on January 26, 1987.

SUMMARY OF ARGUMENT

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE IT DOES NOT PRESENT THE COURT WITH AN OPPORTUNITY TO DECIDE AN IMPORTANT QUESTION OF LAW AND THE STATE COURTS HAVE CORRECTLY DISPOSED OF PETITIONER'S CONTENTIONS.

ARGUMENT

Petitioner requests this Court to hold that his right to counsel was denied within the standards recently set forth in Strickland, supra. He does not request that the Court re-examine the holding of Strickland. Nor has he presented the Court with the opportunity to decide any other important question of federal law. Further, he has failed to even allege that the state court opinion here conflicts with decisions of other state courts, of a federal court of appeals or of this Court. In sum, Petitioner has not identified one factor set forth in Rule 17 which would make this writ a likely candidate for being granted.

Petitioner wants this Court to take his case up in order to apply an established rule of law. The state courts have correctly applied the applicable rule. Indeed, the Michigan Court of Appeals held that Petitioner's right to counsel was satisfied even under the more protective (to defendant) standard of People v Garcia, supra. Petitioner has not demonstrated that his federal constitutional right to counsel has been violated.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be DENIED.

DATED: May _____, 1987

Respectfully submitted,

PAUL L. MALONEY
Prosecuting Attorney
Attorney For Respondent
Berrien County, Michigan

/ks

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

DAN L. FLAUGH, PETITIONER

VS

STATE OF MICHIGAN, RESPONDENT

PROOF OF SERVICE

KATHLEEN A. SCIENSKI, being first duly sworn, deposes and states that on the _____ day of May, 1987, she served the original and 40 copies of Respondent's Appearance, Brief, and Proof of Service in the above referenced matter by depositing in a government mail receptacle in St. Joseph, Michigan, enclosed in a sealed envelope plainly addresed to: Clerk, Supreme Court of the United States, Washington, D.C. 20543; and three (3) copies of the same to:

Mr. Tat Parish, Attorney at Law, 711 Pleasant Street, P.O. Box 409, St. Joseph, MI 49085; and three (3) copies of the same also to: The Honorable Frank J. Kelly, Attorney General, State of Michigan, 525 W. Ottawa Street, Lansing, MI 48913; with first class postage thereon fully prepaid.

KATHLEEN A. SCIENSKI

Subscribed and sworn to before me, a Notary Public in and for the County of Berrien, this _____ day of May, 1987.

LYNN A. LANGE, Notary Public
Berrien County, Michigan
My Commission Expires: 3/14/88